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No. 00-103

IN THE

Supreme Court of the United States

ERICA DORWART,
Petitioner,

v.

JAMES D. SICKING AND GLORIA J. SICKING,
Respondents.

On Petition for a Writ of Certiorari to the Oklahoma Court of Civil Appeals

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Page(s)

CASES

American Trailers, Inc. v. Walker,
526 P.2d 1150 (Okla. 1974) 2

County of Los Angeles v. Davis,
440 U.S. 625 (1979) 3

Evitts v. Lucey,
469 U.S. 387 (1985) 4

McKee v. Neilson,
444 P.2d 194 (Okla. 1968) 2

Norman v. Cook County Officers Electoral Board,
502 U.S. 279 (1992) 4

Panama Processors, S.A. v. Cities Service Co.,
796 P.2d 276 (Okla. 1990) 3

Reno v. Bossier Parish School Board,
__ U.S. __, 120 S. Ct. 866 (2000) 3

State v. Kerr McGee Corp.,
516 P.2d 813 (Okla. 1973) 3

Troxel v. Granville,
120 S. Ct. 2054 (2000) ..... *passim*

United States v. Montalvo-Murillo,
495 U.S. 711 (1990) 4

United States v. R.L.C.,
503 U.S. 291 (1992) 4

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The petition explains why this Court should grant certiorari, vacate the judgment below, and remand the case to the Oklahoma Civil Court of Appeals ("GVR") to allow that court to reconsider the constitutionality of its application of Oklahoma's grandparent visitation statute in this case in light of this Court's intervening decision in *Troxel v. Granville*, 120 S. Ct. 2054 (2000). The basic facts of this case establish that (i) the custodial parent (petitioner Dorwart) objected to the requested grandparent visitation; (ii) the Oklahoma trial and appellate courts accorded her position no special deference, in contravention of *Troxel*; and (iii) the Oklahoma courts applied the "best interests of the child" standard specifically found wanting in *Troxel*.

In their brief in opposition ("Opp."), respondents – who are grandparents of petitioner's child – make two principal arguments. First, respondents assert that certain factual distinctions between this case and *Troxel* suggest that the decision in *Troxel* has no bearing on this case. *See* Opp. at 3-14. Second, respondents contend that this case has become moot. *See* Opp. at 14-15. Neither of those arguments has merit, and neither calls into question the propriety of a GVR in these circumstances.

1. The facts of this case mirror *Troxel* in all relevant aspects.

a. The presence of the father in this case, *see* Opp. 3-8, does not distinguish the circumstances from *Troxel* in any material respect.[1] None of the opinions in *Troxel* suggested that the absence of another parent was in any way pertinent to the decision. The opinions instead focused on the rights of the custodial parent. Here, however, the Oklahoma courts gave no deference to the wishes of the custodial parent because they did not recognize that she had any constitutional right to have her opinion accorded special weight.

b. The fact that the Oklahoma statute might be said to channel the trial court's discretion in certain respects, *see* Opp. 8-11, is likewise immaterial. The critical infirmity of the Washington statute at issue in *Troxel*, as was noted in virtually all of this Court's opinions in that case, was its failure to accord the parent's wishes any special weight. The Oklahoma statute at issue here, and its application in this case, share that

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[1] Indeed, the father disclaimed any support for respondents' position. *See* R. 251, p.142; Answer Brief filed March 15, 1999, at 5, 6. In contending otherwise, respondents rely on factual dictum from the Oklahoma appellate court, *see* Opp. at 6, which is expressly contradicted by the record. In Oklahoma, as in most other jurisdictions, dictum is not binding. *See American Trailers, Inc. v. Walker*, 526 P.2d 1150, 1154 (Okla. 1974); *McKee v. Neilson*, 444 P.2d 194, 198 (Okla. 1968).

very same infirmity.[2]

c. Finally, the ostensibly limited nature of the award of grandparent visitation rights in this case, *see* Opp. 11-12, does not materially distinguish the circumstances from *Troxel*. Regardless of the precise contours of any eventual award of visitation, *Troxel* requires that in determining whether (and to what extent) grandparents should be afforded visitation rights, the parents' views must be given special weight. That was not done here.

2. The case is not moot. Respondents have the "heavy burden" of establishing mootness, *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), a burden they have failed to carry. First, the *temporary* change of custody order focused on by respondents is – as its description reveals – only temporary.[3] Second, that temporary order specifically turned on the Oklahoma court's perception that petitioner had not satisfactorily complied with that court's visitation order, the very order being challenged in this case. *See* Opp. at 1a-7a. Thus, a vacateur of the visitation order would have profound effects on the pending custody issue.[4] Third, the temporary

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[2] The narrowing of the Oklahoma statute to encompass only situations involving death or divorce, *see* Opp. at 9, is inapposite. *Troxel* involved circumstances that would have been covered by the judicially-narrowed Oklahoma statute – the death of a parent.

[3] In Oklahoma, only final judgments and orders (either affirmed on appeal or for which no appeal is taken) are entitled to preclusive effect. *See Panama Processors, S.A. v. Cities Service Co.*, 796 P.2d 276, 283 (Okla. 1990); *State v. Kerr McGee Corp.*, 516 P.2d 813, 819 (Okla. 1973). As respondents note, custody has not been resolved in this case. *See* Opp. at 8. Trial on the issue of permanent custody has been continued until October 10, 2000. Prior to the continuance, the court-appointed custody evaluator testified that awarding permanent sole custody to the father would cause irreparable harm to the child.

[4] In many instances, the Court has rejected a claim of mootness by observing the collateral effects its decision might have. *See, e.g., Reno v. Bossier Parish School Board*, __ U.S. __, 120 S. Ct. 866, 870 (2000) (issue

order was entered on June 5, 2000, and so was issued without benefit of this Court's decision in *Troxel*, which was announced that same day. Finally, any effect that the temporary order might have upon this case can (and should) be addressed by the Oklahoma courts following a GVR.

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of 1992 plan not mooted by passage of time as the 1992 plan will have at least one collateral effect, serving as the baseline against which the next voting plan will be evaluated); *United States v. R.L.C.*, 503 U.S. 291, 296 (1992) (government's challenge to reduction of detention imposed on juvenile not mooted as result of service of reduced term; juvenile had not completed original term and possibility existed that remainder of it could be imposed); *Norman v. Cook County Officers Electoral Board*, 502 U.S. 279, 287 (1992) (challenge to constitutionality of statute setting forth number of signatures was not moot, even though election had been held and stay order had permitted candidate to run; candidates had run and some had met test for future ballot inclusion if they had properly been on the ballot); *United States v. Montalvo-Murillo*, 495 U.S. 711, 714 (1990) (respondent's flight did not moot case, for resolution by the Court of the issue determines the course of proceedings if and when he is rearrested); *Evitts v. Lucey*, 469 U.S. 387, 391 n. 4 (1985) (restoration of civil rights did not moot case, as former prisoner still subject to some collateral consequences, including use of conviction for impeachment in future proceedings and use as an enhancer should he be tried later on any other felony charges).

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, this Court should grant certiorari, vacate the judgment of the Oklahoma Court of Civil Appeals, and remand the case for further consideration in light of this Court's decision in *Troxel*.[5]

Respectfully submitted,

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[5] We do not object to respondents' suggestion that rather than issue a GVR, this Court should grant certiorari and resolve this case on the merits. *See* Opp. at 14.